NO. 43459-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEVE FABRE AND THE POINT DEFIANCE CAFE AND CASINO,

Appellants,

v.

THE TOWN OF RUSTON

Respondent.

MR. FABRE AND HIS BUSINESS'S APPEAL BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erroneously applied the summary judgment standard and erred when it refused to hear Mr. Fabre's motion for summary judgment before dismissing his claims.

2. The trial court erred when it granted partial summary judgment in June of 2011 for Ruston and when it granted summary judgment and dismissed all claims in April of 2012 against Ruston.

3. The trial erred when it found Ruston owed no duty to Steve Fabre and his business.

4. The trial court erred when it found Ruston could not tortiously interfere with Steve Fabre and his business by abusing its power.

5. The trial court erred when it refused to hear Mr. Fabre's motion in limine and disregarded evidence of improper motive.

ISSUE STATEMENTS

1. Whether the trial court may rely upon a cross motion for summary judgment as a party admission that all material facts are undisputed?

2. Whether sovereign immunity protects a town from suit for its official's unlawful activity?

3. Whether Ruston has a duty to non-negligently exercise its limited local powers?

4. Whether Ruston has a duty to not misrepresent its tax rates and its local power to ban gambling through referendum?

5. Whether Ruston may be liable for tortious interference when abusing its limited powers?

6. Whether the trial court should have considered Mr. Fabre's motion in limine before dismissing his claims?

I. FACTUAL SUMMARY

Ruston Agrees to House Banked Card Games At the Point Defiance Cafe and Casino

In 2004, Steve Fabre invested in Ruston knowing he had a positive working relationship with the town. CP 492 and 1157. He worked with the Mayor and Town Council to establish a graduated tax rate on the house banked social card games he was licensed to operate. CP 437,492. The graduated tax rate was a win win tax agreement. CP 1177. The more Steve Fabre's card games generated, the more Ruston received in taxes.

The rate agreed upon graduated up to twelve percent as revenues increased above half a million dollars. CP 82-83. This tax method worked well for Steve Fabre who needed to recoup his significant capital investment in the business. This tax method also worked well for Ruston where Steve Fabre's business was contributing more in taxes than any other local business. CP 367

Ruston's gambling tax authority was limited by state statute. Ruston could not set a tax rate to generate general fund revenues. Instead, the Gambling Act limited the tax rate to a rate under twenty percent of the gross revenue from the games. RCW 9.46.110(3)(f). Any tax collected was to be used primarily for purposes of local law enforcement of the Gambling Act. RCW 9.46.113. From its inception, Ruston covered the

local impact of the card games within the revenues generated from the graduated rate. CP 437, 488, 492-493

Local Advocates Target Steve Fabre's Business

During the same time Mr. Fabre opened his card room, Bob and Sally Everding moved into the neighborhood from out of state. They bought a view home that backed up against the alley side of the card room. CP 172. They did not like Steve Fabre's business. CP 172-174. They expressed their dislike of him. CP174. Sally Everding complained about the parking light shining into her bedroom window. CP 174.

Other homeowners expressed openly hostile animus towards Steve Fabre. Bradley Huson, another view home property owner unapologetically says "Steve Fabre makes my skin crawl." CP 437 and 473. Huson cannot explain his personal animus; however he is clear that he will not speak to Steve Fabre. CP 473. Jane Hunt, also a view home property owner, did not like the service or food at his business. CP 461-462. Dan Albertson does not like gambling and he thought Mr. Fabre provided him inconsistent figures when describing his operation. CP 133 139-140.

These local home owners associated with an organized advocacy group vocal about the development of Ruston named the Ruston

Connection. CP 133. Sally Everding did the graphics and layout for the print publication regularly circulating in the community. CP 481. Jane Hunt was the printer and an author. CP 191. Dan Albertson was a contributing author. CP 171.

Through the Ruston Connection, these home owners supported businesses and neighbors they liked. One friend was the Chinese Christian Church, run by Rev. Dr. Douglas and Dr. Belinda Louie. CP 602. Dr. Louie used the Ruston Connection advocates to vet his complaints about the card room. CP 439. Ultimately, Steve Fabre had to sue the Ruston Connection and the Louies for defamation. CP 653. He accepted an amicable settlement on March 15, 2010.

Steve Fabre resolved a public records claim against Ruston on August 16, 2007, which was related to the Ruston Connection case. It concerned an exculpatory letter from the prosecutor clearing him of any criminal wrongdoing alleged by the Louies.[1]

Local Advocates Assume Power in Ruston

The power in Ruston shifted to the Ruston Connection advocates in 2008. Dan Albertson lost the local election. CP 3, 146. However, he had Bob Everding appoint him anyway to another vacancy. CP 82, 649.

[1] The Louies claimed he was stealing electricity from them through a public utility power line. CP 436437

Albertson and Huson then had Jane Hunt appointed in early 2008 CP 4, 195, 691. They then appointed Bob Everding as Mayor. CP 81, 298, 647, 691. By July of 2008 and without a vote of the public, the Ruston Connection advocates with an express animus towards Steve Fabre and his business were in power. Within short order, Steve Fabre's business became the target of these newly empowered officials.

New Regime Focuses on Steve Fabre and His Business - Tax Hike

These officials promptly adopted a 400% tax hike on Steve Fabre's card room. CP 86-89, 321, 499-509. They eliminated the graduated tax rate. CP 86-89. They substituted a fixed tax rate of twelve percent with a promise to revisit the rate again to get to the proposed twenty percent statutory maximum. They did not raise anyone else's taxes, just Steve Fabre's card game taxes. CP 438. Other businesses offered gambling, but the officials left their tax rates alone. CP 438.

Tax Hike Enforced

Steve Fabre tried repeatedly to work with these hostile officials. CP 376-377. He asked to meet with them. He tried to talk with them on the phone. CP 374, 380, 386. He invited a study session. CP 134. He pointed out the procedural errors with the tax hike. CP 243-244, 438. He pointed out the substantive problems with the tax hike. Id. Ruston's

officials gave him no deference. CP 246. Ruston disagreed with him and insisted its rate was enforceable. Id. Ruston's Mayor insisted upon prompt payment of the tax hike. CP 241. Ruston rejected Mr. Fabre's request that Ruston stay enforcement of the tax hike until such time as the trial court ruled on his declaratory action challenging the tax hike. CP 8, 439. Ruston refused to stay enforcement of the tax hike. CP 8, 439. Ruston took no precautionary measures to ensure Mr. Fabre's business could operate at a lawful tax rate, instead it insisted it would tax his card room revenues at its void tax rate.

Tax Hike Void

On May 28th, 2010, Judge Cuthbertson declared Ruston's tax hike void, rather than voidable. CP 743-744. The tax rate was void from its inception and thus never enforceable. Id. Ruston disregarded its own procedural requirements to escalate Steve Fabre's card room rates. Id. It erred when it passed the measure on first reading, bypassing public comment and a second reading. Id. The Mayor acted without authority when he demanded Steve Fabre pay the higher rate. Id. When Ruston refused to stay enforcement; Steve Fabre could not offer the card games without committing increased revenues to Ruston. CP 439. He could not afford to pay more taxes to Ruston, so he stopped offering the house

banked games. CP 437. He intended to stop the house banked games temporarily. But, as soon as he prevailed in his declaratory action, Ruston targeted his business again.

Ruston Pursues Ban by Referendum

Ruston did not immediately repeal its tax hike. Instead, Ruston actively pursued a Referendum to ban his house banked card games. CP 594, 745, 842, 888-889. Ruston's council members actively lobbied for a ban on his card games. CP 842. Two of them wrote the pro statement for the voter's pamphlet. CP 1119. The pro statement negatively references Steve Fabre, to the effect that Ruston should not be told what to do by him, particularly given his status as a business resident, rather than a homeowner. CP 1119. The Referendum received fifteen more votes than the votes opposed at the November 2010 general election. CP 1015. The Mayor and the Council considered the Referendum effective in banning card games at Mr. Fabre's business. CP 255.

Ruston Codifies Void Tax Hike

Ruston hired a code reviser to codify its ordinances on June 6, 2010. CP 1056. The Mayor has Ruston's void tax hike codified without reference to the court order. CP 91-92, 1174-1175, 1177. Ruston makes no effort to notify the public, which includes investors who may be

interested in the card room, that Ruston's tax rate is reasonable. Instead it codifies its exceptionally high tax rate, keeping it on the books and apparently in effect. CP 91-92.

Ruston Delays Repeal of Void Tax Hike and Referendum

Steve Fabre cautioned Ruston that its Referendum was not proper. CP 253. Ruston does not have referendum powers. CP 253, 644-645. As with its tax hike, Ruston refused to listen to him. CP 1140. Instead it insisted it could ban his card games. Steve Fabre filed another declaratory action to void the Referendum. CP 745, 1142. After several months, Ruston finally repealed its void tax hike, as well as its void Referendum.[2] CP 110-112, 1152.

After several years of losing card room income, Mr. Fabre seeks to recover his losses caused by Ruston's unlawful behavior and interference with his business. A set of stipulated facts from the declaratory judgment action on the tax hike provide an undisputed set of historical facts applicable to this case. CP 81-84. In addition, Mr. Fabre set forth a detailed chronology with citations to the record the trial court relied upon when it granted in part his initial motion. CP 576-586.

[2] Ruston repealed Ordinance 1253 through Ordinance 1326 on December 23, 2010. Ruston repealed the Referendum through 1328 on February 7, 2011.

II. PROCEDURAL HISTORY

Steve Fabre filed his claim form with Ruston on November 19, 2008. CP 222-227. He filed his tort claim on December 6, 2010 and amended it on December 8, 2010. CP 1-16. Ruston answered and claimed immunity and the public duty doctrine as two of its primary defenses. CP 17-28. Mr. Fabre sought an early order dismissing these affirmative defenses.[3] CP 41-59. Ruston counter moved for summary dismissal. CP 253-271. On June 24, 2010, the trial court granted summary judgment in part and denied summary judgment in part. CP 720-724. The trial court decided Mr. Fabre's case could proceed against Ruston on negligence and tortious interference theories. CP 720-724. He ruled a special duty arose from Mr. Fabre's declaratory action to void the tax hike. CP 720-724. The trial court further ruled that Mr. Fabre's claims commenced on May 28th, 2010, which is the date of Judge Cuthbertson's order declaring the tax hike void. CP 720-724.

Mr. Fabre undertook discovery abiding by the trial court's ruling. He focused entirely upon the actions and inactions of Ruston after the date specified by the trial court's order.

After the close of discovery and less than a month before trial,

[3] Mr. Fabre appeals the trial court's rulings as to Ruston; thus his briefing does not address his claims against the individually named defendants for their actions outside the course and scope of their conduct attributable to Ruston.

Ruston moved a second time for summary judgment. CP 725-739. This time Ruston again claimed it owed Mr. Fabre no special duty from May 28th forward and it could ban his business through an advisory referendum. CP 725-739.

During discovery, Ruston refused to produce any e-mail or other evidence requested in written discovery. CP 763-1003. Mr. Fabre moved in limine to suppress Ruston's offered evidence relied upon in its summary judgment argument. CP 763. The trial court continued Mr. Fabre's evidentiary motion and never heard it. RP 120.

The trial court reversed its prior ruling on summary judgment. CP 720-723, 1352-1356. This time the trial court decided against any special relationship arising from the Cuthbertson order declaring the tax hike void, and further that tortious interference requires an act outside, rather than within, Ruston's authority. The trial court decided Ruston had authority to ban card games. The trial court dismissed Mr. Fabre's case in its entirety. CP 1354-1356.

III. LEGAL ARGUMENT

A. Summary Judgment Dismissal Reviewed De Novo

The standard of review of an order of summary judgment is de novo. *Smith v. Safeco Ins. Co.*, 150 Wn. 2d 478, 78 P.3d 1274 (2003).

B. The Trial Court Erred In Concluding Cross Motions on Summary Judgment Equate to An Admission of Undisputed Facts

In its second ruling on summary judgment, the trial court expressed its belief that Mr. Fabre's cross motion for summary judgment equated to a concession that the facts in this case are undisputed:

> "The Court finds that there is no genuine issue of material fact relating to Plaintiffs' claims. The Plaintiffs acknowledged as much by filing their own Motion for Summary Judgment." CP 1352.

The trial court reached an erroneous conclusion. Mr. Fabre never stipulated to Ruston's facts. CP 1004-1005, 1006-1016. In Ruston's briefing on summary judgment, it argued there was no enforcement of its tax hike, that it was never collected, and there were no efforts to collect it. CP 1210. Mr. Fabre disputed these facts. CP 421-425, 573. He argued the tax hike was enforced, there were efforts to collect it, and that he had to set aside that revenue and hold it in trust for months, and that he was never able to operate with any certainty that Ruston was not going to collect its increased tax until it repealed the tax months after it was declared void. CP 1020-1024, 1156. In the absence of any concession, stay, or injunction as to the void nature of tax hike he had to commit his card room receipts to the tax hike or face criminal penalties. Similarly with the ban, until it was repealed he could not reopen. Ruston effectively banned his activity for more months without any legitimate authority.

Mr. Fabre counter moved by relying upon a series of material and undisputed facts never addressed by Ruston to show Ruston should be found liable as a matter of law. The trial court failed to specify what facts it relied upon to conclude Ruston breached no duty and did not tortiously interfere with Mr. Fabre and his business.

The trial court's erroneous assumption further prejudiced Mr. Fabre because the trial court did not have before it all of Mr. Fabre's evidence on his cross motion. The trial court ruled on Ruston's motion for summary judgment without hearing Mr. Fabre's motion. Thus, the trial court did not have before it all of the facts relevant to make an assumption that all material facts were undisputed.

The trial court's letter opinion suggests the trial court misinterprets its role on summary judgment. The trial court may not decide disputed facts. Material questions of fact may not be properly resolved by summary judgment. *Clarke v. Alstores Reality Corp.*, 11 Wn. App. 942, 527 P.2d 698 (1974). Summary judgment may not be used to try questions of fact, but is limited to those instances in which there is no genuine dispute of fact. *Thoma v. Montag (C.J.) & Sons*, Inc., 54 Wn.2d 20, 337 P.2d 1052 (1959). The duty of the trial court is to decide whether there are genuine issues as to a material fact requiring formal trial. *Barovic v. Cochran Electric Co.*, 11 Wn. App. 563, 524 P.2d 261 (1974).

In this case, the trial court incorrectly assumed material facts were not in dispute without ever hearing Mr. Fabre's cross motion and without entry of any findings. If the trial court had heard Mr. Fabre's motion as scheduled before reaching its conclusion, the trial court would have understood Ruston breached its duties to Mr. Fabre and his business and tortitiously interfered with his business activities.

C. Trial Court Erroneously Afforded Ruston Sovereign Immunity

Ruston's dismissal from this case before trial recreates sovereign immunity for a town that is neither sovereign nor immune. A town such as Ruston, acting in a governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct. RCW 4.96.010(1). When the trial court dismissed Mr. Fabre's case against Ruston, it violated the rights afforded citizens such as Mr. Fabre to sue the town to recover his damages caused by the City's misconduct. The courts caution against a blanket grant of immunity for the performance of a public function. *Howe v. Douglas County*, 146 Wn. 2d 183, 43 P.3d 1240 (2002)(County may not enforce a release that includes waiver of liability for negligence). The trial court erroneously granted Ruston sovereign immunity for its negligence in unlawfully taxing and later prohibiting Mr. Fabre's business. The trial court also erroneously granted Ruston sovereign immunity for Ruston's

intentional misconduct in tortiously interfering with his business.

1. Common Law Negligence Applies to Ruston for Its Negligent Undertaking of a Tax Hike and Cardroom Ban

Ruston argued and the trial court erroneously accepted Ruston's contention that the common law tort of negligence does not apply to Ruston unlawfully raising his gambling taxes or banning his cardroom. Ruston relied upon the absence of any case establishing a cause of action for negligent taxation or use of police powers to ban a business. Ruston cited to gambling tax cases where the business sought recovery of overpaid taxes in a declaratory action. CP 729. *Swartout v. City of Spokane*, 21 Wn. App. 665, 586 P2d. 135(1975). Ruston pointed out that the business was permitted recovery of overpaid taxes, but not general or special damages in addition to the over paid taxes. Of significance, Ruston failed to recognize as pointed out by Mr. Fabre that the business in the cited case was not pursuing tort claims, the business filed a declaratory action only wherein the relief is statutorily limited. RCW 7.24.080 and RCW 7.24.100. Here, Mr. Fabre prevailed previously in his declaratory action on Ruston's unlawful tax hike, and this action is his separate tort action for damages. The legal analysis is different in a tort case.

The courts have never held that negligent taxation or exercise of police powers to ban a business cannot be the basis of a negligence claim

against a local government. In cases where the local services provided apply to the public generally, the case law has developed some clarity. For example in construction cases, the courts do not recognize a cause of action such as negligent permitting absent a recognized exception. *Howe* at 146 Wn. 2d at 192. The duty was narrowed given the broad spectrum of the public who may apply for a permit. Here, this case is different because very few people qualify and can afford a house banked card room license. Mr. Fabre owned the only business licensed to operate a house banked cardroom in Ruston.

The question of whether Ruston may be liable for negligent taxation or negligent use of its police powers to ban his type of business is a case of first impression. Mr. Fabre maintains Ruston can and should be liable for negligently undertaking a tax hike and ban on his card room. In essence Ruston's officials failed to exercise ordinary care resulting in foreseeable harm. The Gambling Act grants exclusive power to the state over gambling such that a local jurisdiction may not regulate gambling through misapplication of its limited local authority. Ruston undertook activities outside the scope of its limited authority and should be liable for the harm it has caused Mr. Fabre's card room. The duty was owed to him, the only cardroom in town and the only one to challenge Ruston's actions, and not to the public generally.

2. Duty Arises From Ruston's Negligent Undertaking

A party may pursue a negligence cause of action against a municipality if a duty can be shown. *Meaney v. Dodd*, 111 Wn. 2d 174, 179, 759 P.2d 455 (1988). Common law negligence arises from a duty imposed upon a defendant to refrain from the complained of conduct that is designed to protect the plaintiff against the foreseeable harm that likely results from the conduct. *Bernethy v. Walt Failor's, Inc.*, 97 Wn. 2d 929, 653 P.2d 280 (1982). A municipality is no different than an individual; both are held to a general duty of care. *Keller v. City of Spokane*, 146 Wn. 2d 237, 44 P.3d 845 (2002). A general duty of care is that of a "reasonable person under the circumstances." Id at 243.

One measure of reasonableness is whether the incident complained of was foreseeable. Here, Mr. Fabre complains that Ruston acted unreasonably when it unlawfully raised his taxes and banned his cardroom using a referendum power it never had. The business losses Mr. Fabre suffered were foreseeable harm from Ruston's misuse of its limited tax authority and lack of any referendum powers to ban his cardroom.

In the *Keller* case, the court explains that a municipality has a duty to exercise ordinary care to keep its public roads in a safe condition for ordinary travel. *Keller* at 246. This duty of ordinary care to the public using its roadways is not a guarantee of safe travel nor insurance against

an accident. *Keller* at 248. This duty merely obligates a municipality to "exercise ordinary care to keep its public ways in a reasonably safe condition for persons using its ways in a proper manner and exercising due care for their own safety." Thus, there is a duty enforceable against a municipality by users of its roadways for negligence.

This duty related to negligent undertaking in cases of foreseeable harm has been applied in premises liability cases involving public entities. *Iwai v. State*, 129 Wn..2d 84, 915 P.2d 1089 (1996); citing to *Sorenson v. Keith Uddenberg, Inc.*, 65 Wn. App. 474, 828 P.2d 650 (1992)(Slip and fall on accumulation of snow and ice in parking lot). A public entity that elects to clean up its premises must do so non-negligently, and plaintiff need not prove actual knowledge by the entity of the dangerous condition. *Id.* The inverse is also true, a local entity that fails to act to clean up its premises also has a duty to a business user who is harmed. A local entity that controls the business premises has a duty to the businesses operating within its area of control. *Afoa v. Port of Seattle*, 160 Wn. App. 234, 247 P.3d 482 (2011)(Port had duty to maintain premises where contractors were working).

The Restatement 2nd of Torts describes a duty to act non - negligently in the performance of ones duties, including the delivery of services. Restatement 2nd of Torts § 323. One who renders services to

another that are necessary to the protection of the other's person or things is subject to liability for physical harm resulting from the failure to exercise reasonable care. Ruston provides municipal services to Mr. Fabre's business such as tax collection and local business licensing that directly affect his ability to operate.

Mr. Fabre contends Ruston owes him a duty of ordinary care to maintain a safe operating environment for his business that protects his ability to continue to operate, which is consistent with the officials' oath of office. CP 521-522. This duty to protect from unreasonable or unauthorized local control is not a duty to promote his business or to insure his success. This duty obligates Ruston to follow a reasonable standard of care when it undertakes or exercises local police powers so that he can operate as authorized under state law and pursuant to his state issued license. Ruston may not undertake local control in a negligent manner such that his business suffers foreseeable losses. Specifically, Ruston may not enforce an illegal tax rate and it may not illegally ban gambling.

3. Harm to Mr. Fabre's Cardroom Foreseeable

The risk of harm to Mr. Fabre's business was foreseeable. Ruston's unlawful tax hike of 400% increased Mr. Fabre's local tax obligation by

$9,000.00 per month. He told them he could not afford to pay the tax increase. CP 367, 1371-1372. He told them he would need to shut down his cardroom if Ruston raised his taxes. CP 367. Ruston's officials disregarded his express concerns about the ongoing viability of his business.

He asked them to agree to stay the tax increase so that he could obtain a declaratory order without risk of civil or criminal penalties as to payment of the tax increase and Ruston refused. CP 664. He sought a stay and immediate injunctive relief from Superior Court, and the court denied him immediate relief when Ruston refused to certify the vote count on the ordinance or certify a record of the hearings on the ordinance.[4]

Ruston adopted a penalty statute that would apply to his failure to pay the increased taxes. Ruston did this around the time he asked for a stay. Ruston knew civil and criminal sanctions against Mr. Fabre would compromise not only his well being, but his good standing with the Gambling Commission that licenses his cardgames. His cardroom license costs him approximately $25,000.00 dollars annually. The harm to his business from the tax hike Ruston adopted was foreseeable as was the risk

[4] Mr. Fabre offered the audio recordings of the hearings. He could not certify the content of these audio recordings because he was not the clerk nor was he present at the proceedings. The trial court refused to listen to the audio recordings and Ruston refused to stipulate to the vote count or prepare a certified transcript of the proceedings. CP 617-618. The hearing was continued for months.

of harm of not having the tax increase stayed while he sought judicial relief.

Ruston could have mitigated its own liability for its tax increase by agreeing to stay enforcement. When the Mayor sent his letter demanding payment and when Ruston refused to agree to a stay or to otherwise agree not to collect the increased taxes, Ruston was enforcing its tax hike.

Similarly with regard to its ban, Ruston insisted its ban was enforceable. Ruston refused to concede it had no referendum powers and was insisting upon the validity of its ban. Thus, it was enforcing its ban without authority. Banning his most profitable activity clearly caused foreseeable harm to his business.[5]

The trial court failed to recognize Ruston's insistence upon the validity of its tax hike and ban with the threat of both civil and criminal penalties to include jail time as enforcement action. The trial court made the erroneous finding that Ruston did not enforce the tax hike or ban.

The reason Ruston's enforcement is important is because ministerial acts, and enforcement activities are not covered by discretionary or legislative immunity. Ruston has no immunity for a tax hike it enforces when the tax hike is unlawful. Ruston has no immunity for banning Mr. Fabre's cardroom operation by a referendum and statutory power it does

[5] The house banked games generated revenues of over a million dollars. CP 1161.

not have.

4. Legislative Immunity Not Applicable To Ruston's Enforcement

Legislative immunity has no application to action taken in an enforcement capacity. *Supreme Court of Virginia v. Consumer Union of U.S., Inc.*, 446 U.S. 719, 100 S. Ct. 1967 (1980)(Virginia Court and its members proper defendants for their role in enforcing Code of Professional Responsibility regarding attorney advertising); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992)(Question of fact regarding City's arbitrary and capricious action when City failed to seek a stay of the trial court's ruling enjoining enforcement of a land use regulation); *R/L Associates, Inc. v. City of Seattle*, 113 Wn. 2d 402, 780 P.2d 838 (1989)(Seattle in contempt for press release expressing City's intent to continue to enforce tenant relocation requirements after court in separate action had enjoined City's enforcement of the provision.)

Two important facts are found in these state cases of importance to reversing the trial court's error as to whether Ruston was enforcing its tax hike and ban.

First, a stay allows a municipality to enforce an ordinance without risk of liability. Here, Ruston refused any stay or other injunctive relief so that it could insist upon enforcement of its tax hike during the pendency of

the declaratory action without risk of liability. Of significance, the trial court found the tax hike void from its inception, rather than voidable. A void ordinance is a nullity, while an ordinance that is merely erroneous is voidable, but until avoided is regarded as valid. *Dike v. Dike*, 75 Wn. 2d 1, 448 P.2d 490 (1968). Ruston had no authority to insist upon a higher tax rate. Ruston held Mr. Fabre hostage for years over a tax rate that was a nullity.

Ruston faced a similar ruling that its ban was void. Mr. Fabre could not get Ruston to agree that it had no referendum powers without filing another declaratory action against it. Ultimately, Ruston agreed to repeal its ban by referendum, but it took months for it to do so. In the interim, Ruston maintained its ban was valid; thus precluding Mr. Fabre from reopening his cardroom. Several months passed from the date Ruston pursued its referendum and the date of its repeal.

The second point of significance from the case law addressing enforcement is that when a city makes a public statement that its ordinances are valid, it is engaged in enforcement action. Ruston did this precisely when it codified its illegal tax hike after the court declared the tax hike void. CP 1013. Ruston published the effective date of the tax hike as the date it was heard. Ruston's tax hike appeared in its official ordinances without reference to the order declaring the rate void. Thus,

the public, including investors who may be interested in purchasing the cardroom, understood Ruston had a flat tax rate of twelve percent. CP 1173-1178. This tax rate was exceptionally high and acted as a deterrent to investment interest in his cardroom. Id. Further, Steve Fabre had no assurances that Ruston intended to comply with the trial court's declaratory order.

Finally, the courts have given meaning to the term "law enforcement", which provides some guidance as to the meaning of the term "enforcement." Law enforcement means the act of putting the law into effect. *Prison Legal News, Inc., v. Dep't of Corr.*, 154 Wn. 2d 628, 640, 115 P. 3d 316, 322 (2005). Here, Mayor Everding sent a letter to Steve Fabre insisting his business increase its tax payments. The Mayor did so arbitrarily because the tax hike ordinance failed to include an effective date. CP 89. His wife who Ruston hired as its code reviser disagreed with him as to the effective date. She selected the date it was voted on, he picked the date it was published. CP 92, 168, 241. By rule the ordinance required an effective date. An effective date is essential with a tax ordinance. Without an effective date the tax calculation is impossible. CP 492. The Mayor never changed his position, nor did any other Ruston official. Both the City Attorney and the Council insisted Mr. Fabre had to pay increased taxes or be subject to civil and criminal

prosecution. RMC 1.18. Mr. Fabre never received any letter notifying him that Ruston repealed its void tax and that he no longer had any obligation to pay the tax hike. Similarly, he did not receive any communication indicating the ban was unenforceable. Ruston failed to promptly and immediately repeal its void ordinances, or otherwise acknowledge the unenforceability of its void ordinances in any public meeting. Ruston has no immunity to shield it from negligence liability because it was indeed enforcing void ordinances.

5. Local Jurisdictions Have No Policy Making Authority To Claim Legislative Immunity

The trial court's decision to afford Ruston, the municipal entity, legislative immunity was erroneous because legislative immunity applies to the individual officers, not the public body. And, legislative immunity applies to legislative acts, not local administrative or ministerial functions. In the case of gambling, the State legislature, rather than local government, has exclusive policy making authority. RCW 9.46, WASH. CONT. Art. II § 24. Local jurisdictions have no power to regulate gambling. RCW 9.46.285. Ruston had limited power to set a tax rate sufficient to offset the local impacts on law enforcement of a cardroom within its jurisdiction. RCW 9.46.113. Ruston exceeded its authority. RCW 9.46.295. Ruston had no power to ban a cardroom. Ruston had no

authority to act in a legislative capacity that would afford it legislative immunity.

Absolute immunity, such as the legislative immunity afforded Ruston leaves Mr. Fabre without a remedy. The absence of any remedy "runs contrary to the most fundamental precepts of our legal system." *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992). Thus, when deciding whether an absolute immunity applies, the court must start with the proposition that there is no immunity. Id. A person claiming immunity must prove the immunity justified before the courts will impose it. Id. *Trevino v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994)(Burden of proving immunity on party asserting it) Treating the entity as distinct from the individual officials provides a compromise to the detrimental consequences of denying any relief to a claimant through a grant of absolute immunity. Id. at 111. For purposes of Section 1983 liability, the courts have denied municipalities even qualified immunity from suit. *Mission Springs, Inc. v. City of Spokane,* 134 Wn. 2d 947, 954 P.2d 250 (1998).

A municipal entity such as Ruston may be liable for the actions of its officials even when the officials are immune from suit in an individual capacity for the same acts. There is an absence of any case finding legislative immunity for a municipal entity since the Legislature broadly

waived municipal sovereign immunity and where the municipal power is restricted by state law to purely administrative functions. Here, Ruston should not escape liability on grounds of legislative immunity.

6. Ruston Had No Power To Tax Cardgames To Increase The General Fund and It Violated Its Own Policies

The state constitution restricts the power of a municipal corporation to take private property for the payment of corporate debt. WASH. Const. art. XI § 13. In 1973 with the adoption of the Gambling Act, the Legislature preempted all regulatory control over gambling. RCW 9.46.285. To support its policy of strict state regulation and control, the Legislature limited local taxing power of gambling. RCW 9.46.010 and RCW 9.46.270. The Gambling Act authorizes a limited tax at the local level to offset local impacts. RCW 9.46.110. Local jurisdictions were prohibited from taxing cardgames for purposes of balancing the general fund. RCW 9.46.113.[6] Any tax on cardgames were strictly limited for use primarily for purposes of local law enforcement of the Gambling Act, not to balance the budget. Id. The application of the limited local taxing authority must be strictly construed to permitted activities and to persons permitted to engage in the activities. RCW 9.46.270. Thus, Gambling

[6] The Legislature later amended the Gambling Act to expand the purposes for which the tax, which was after Mr. Fabre challenged the tax hike. RCW 9.46.113.

Commission licenses are afforded special protection from local taxation.

Because the Legislature afforded special protections to Gambling Commission licensees from local taxation and restricted local taxation for the limited purpose of offsetting local impacts, Ruston lacked any legislative authority when setting the tax rate applicable to him. Ruston could not act in a policy making capacity. It could merely set the rate necessary to offset the local impact. Establishing a rate sufficient to offset local impacts is a purely ministerial function. It was also a purely administrative function applicable only to Mr. Fabre as the only licensee and not to the public generally. Mr. Fabre was an individual business with special standing unique from the general public that precludes any application of legislative immunity. Thus, the scope of Ruston's authority was not legislative in nature. It was purely administrative. Ruston could set a tax rate on cardgames sufficient to offset the local impact on law enforcement to enforce the Gambling Act.

The case law permitting use of excess funds from gambling taxes does not suggest that the tax could be set at an amount in excess of any offset. The case law holds that Ruston was required by law "in the first instance" ascertain the level of revenue required to met its local enforcement needs. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn. 2d 1, 802 P.2d 784 (1991). While this case concluded any excess

could be spent for other purposes; the case did not dispense with the statutory requirement of determining the local impact on law enforcement before increasing the rate.

Here Ruston set a tax at a rate sufficient to offset local impacts on law enforcement when it adopted the graduated rate. CP 662. There was no evidence, nor was there any effort at obtaining evidence that its graduated rate was insufficient to offset local law enforcement needs. CP 461, 473-474, 499-508. In fact, Mr. Fabre offered significant evidence that an increase was not needed. CP 466, 492-493, 661.

Mr. Fabre contends the actual purpose for the tax hike was to retaliate against him. The timing of the tax hike within a month of him settling the case with the Ruston Connection evidenced Ruston's retaliatory animus. In addition to the timing of the tax hike, he also offered evidence that these officials did not like him or his business activity. CP 496, 661. The trial court ignored this evidence.

In the declaratory action, Mr. Fabre proved Ruston's tax hike was void. The trial court found the Council acted outside its authority and in violation of its own policies. Thus, there is no way for Ruston to claim legislative immunity when it never acted within the scope of any legislative authority. It had none.

7. Ruston Had No Power To Ban A Cardroom

The trial court erroneously read into the Gambling Act authority for Ruston, a town, to impose a ban on gambling. CP 98. RCW 9.46.295 allows cities and counties to impose a ban, not towns. The statute omits any reference to towns in subsection (1), the provision granting authority to prohibit specific activities.

Following the basic rules of statutory construction, the courts may not read into a statute words that are not there: we "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003).

The trial court read into subsection (1) the term "town," even though the provision is not ambiguous. If other sections of the Gambling Act were not specific to include reference to towns, there may exist some question as to whether the Legislature intended to include all municipal entities when using the term city. However, the Gambling Act makes specific reference to the term "town," in other subsections and sections. See, RCW 9.46.295 (2) and (3); and RCW 9.46.270 and RCW 9.46.285. Thus, the Legislature would have made reference to towns if it had intended to include towns within the power to ban gambling. It makes sense that the Legislature excluded towns from the power to ban and instead delegated such authority only to cities and counties. A small town

within a county with a ban could present issues of corruption given the limited opportunity for competition in remote areas. The power of the County over gambling in Ruston appears in Ruston's gambling ordinance: "Collection and administration of the tax herein imposed shall be by Pierce County..." RMC 5.02.010; and "The collection of the tax imposed by subsections (b) and (c) of this section shall be by ... the Pierce County Commissioners." RMC 5.02.020. The trial court erred when concluding Ruston had the power to ban gambling.

8. Ruston Had No Referendum Power

Ruston tried to ban Mr. Fabre's cardroom using a Referendum when it had no referendum powers. A town has no referendum powers because the power to pass ordinances is vested exclusively in the council. RCW 35.27.370 (1) and (16) and Wash. Const. Art. 2 § 1. Referendum powers must be specifically reserved in order for the Council to have the power to pass measures on to the people. *Amalgamated Transit Union Local 587 v. State,* 142 Wn. 2d 183, 11 P.3d 762 (2000); *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936). Towns have no capacity to reserve referendum powers to the people; only charter cities have such power. CP 644-645. The Gambling Act offers no authority for local referendums on gambling. Specific reserved powers on the subject of any measure to the

people is required. *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn. 2d 41, 272 P.3d 227 (2012).

Ruston argued its Referendum No. 1 was merely an advisory vote. However, it was never presented as an advisory vote. CP 119. In the *Mukilteo* case, the court rejected the city's argument that its proposition was merely advisory: "This language, which is ambiguous at best, is insufficient to overcome the clear intent of the proponent to bind the City Council on the plain language of Proposition 1 when asking the voters to enact the law." Similarly here, Referendum 1 was not advisory. Referendum 1 was not clearly marked as an advisory vote. Ruston called it a Referendum. CP 120. Ruston represented it was delegating the decision to the people. Ruston conditioned effectiveness of its ban on an affirmative vote of the people. Ruston took no opportunity to consider public input on the measure before adopting a ban.

Ruston was not and could not have been acting in any legislative capacity when it tried to prohibit Mr. Fabre's card games. Ruston lacked the authority to ban and it lacked any authority to delegate the question to the people by way of a referendum. Thus, Ruston has no legislative immunity for its erroneous ban. Ruston had a duty for purposes of supporting a negligence cause of action to not cause foreseeable harm to Mr. Fabre's business through the negligent undertaking of a ban on his

business.

9. Duty of Care Specific To Steve Fabre and His Cardroom

A municipality's duty to perform non-negligently or to undertake its regulatory powers in a non-negligent manner is expressed in the cases discussing the duties of a local building department. When a municipality undertakes the service of issuing a building permit to a builder, it undertakes a duty to use reasonable care in performing that service. See, *Taylor v. Stevens County*, 111 Wn. 2d 159, 759 P. 2d 447 (1988). The *Taylor* court narrowly tailored this duty to apply to circumstances where a public official interacts with a particular builder and makes specific representations about local regulatory controls. The court applied the special relationship exception to the public duty doctrine in its analysis, explaining the exception as a "focusing tool" to decide whether the government's duty focuses sufficiently on a particular claimant to avoid the broad negative policy implications of a generalized duty to the public as a whole. *Taylor*, at 166. A public duty to all is a duty to no one, thus in cases of negligence the courts may identify a special relationship to impose a duty upon the municipality. Three criteria may be used to ascertain whether a special relationship exists:

> (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart

> from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.

Using these criteria, Ruston developed a special relationship with Steve Fabre, the only cardroom operator in Ruston, which obligated Ruston to exercise due care to protect his business from harm.

10. Ruston's Direct Contact and Privity With Steve Fabre

Steve Fabre operates the only cardroom in Ruston. His cardroom was the first cardroom in Ruston. His cardroom remains the only cardroom in Ruston. The unique nature of his business activity as a cardroom operator with a license to operate in Ruston sets him apart from the general public.

From the date he applied for his business license to operate in Ruston, Steve Fabre has been in direct contact with local officials. He applied for and received a business license from Ruston. Before he could open his cardroom, he met with the Mayor and Councilmembers to establish a graduate tax rate that complied with the Gambling Act. He recommended the graduated tax rate at the scale Ruston adopted when it passed its first cardroom tax rate in April 2003.

Ruston officials, specifically Mayor Wheeler, promised him the opportunity to recover his significant investment by linking the tax rate to

his revenues earned. CP 492. This provided Mr. Fabre express assurance that he could afford to operate in Ruston.

Ruston expressed no interest in banning his cardroom or any cardroom in Ruston. In fact, Mayor Wheeler and the Council encouraged him to open a cardroom. Ruston wanted a thriving cardroom in Ruston. When opening, Ruston's ability to ban a cardroom was the same as it was in 2009 when it sought to do so by a referendum power it did not have. Yet, Ruston chose to encourage rather than prohibit Mr. Fabre's cardroom activity. From this date forward, Ruston had direct contact with Steve Fabre and his business.

Other points of contact are of significance to Mr. Fabre's special relationship with Ruston, and clearly establish he had privity with Ruston. First on the tax issue, Mayor Everding sent Mr. Fabre a letter notifying him that Ruston increased his cardroom tax rate. When the Mayor sent him this letter, Ruston assured Steve Fabre he was bound to pay the increased rate. Mr. Fabre questioned the legality of the new tax rate. He asked Ruston to stay enforcement of the higher tax rate while he sought a declaratory order that the rate hike was void. Ruston refused his request. Thus, Ruston made express assurances that Ruston's tax rate was indeed a flat rate of twelve percent rather than the historical graduated tax rate linked to revenue. Mr. Fabre was forced to bring a formal declaratory

action against Ruston to declare this rate void. When Mr. Fabre proved the tax rate was void, Ruston continued to maintain its flat rate was the correct tax rate. Ruston did not immediately repeal the void rate. Ruston published its void tax rate in its code, and made no reference to the court order declaring flat tax rate void. Ruston acted contrary to the court's order. The order itself created a duty to Mr. Fabre to act in conformity with the order. CP 104-105. Yet Ruston ignored the order and codified its void rate without reference to the order.

On the second issue of banning his cardroom, Mr. Fabre contacted the Mayor and informed him Ruston could not ban his cardroom. The Mayor and Council disagreed with his position, and proceeded to pursue a ban on his cardroom through a referendum power it did not have. Ruston refused to repeal its void referendum for months after recognizing it had no referendum powers. Ruston refused Mr. Fabre's specific request that it not enforce its ban. Ruston forced Mr. Fabre to file a second declaratory action against it to prove the ban void. Thus, Ruston made specific representations to Mr. Fabre that his business activity was banned form months when legally it was not.

11. Ruston's Express Assurances

The express assurances Mr. Fabre derived from his direct contact

with Ruston are the following:

Ruston expressly assured Mr. Fabre that he could afford to operate by adopting a graduated tax rate linked to revenue. Ruston expressly assured Mr. Fabre that he could operate a cardroom in Ruston, and that his activity was not banned. Ruston then reversed its position and expressly assured him he had to pay a flat tax rate and later that he could not operate at all because he was banned. These express assurances resulted in harm to Mr. Fabre who justifiably relied upon them.

12. Steve Fabre's Justifiable Reliance

Steve Fabre justifiably relied upon Ruston's express assurances. Steve Fabre worked with officials who had the power to bind Ruston. Ruston is a municipal corporation. A municipality operates through its elected officials. *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 77, 265 P.3d 956 (2011). The corporation's officers, directors, and other agents must discharge the duties of the corporate entity. Id. These duties include a duty of operating in good faith and with such care as an ordinarily prudent person would use under similar circumstances. Id. Town officials must take an oath and file a bond swearing to their faithful performance of their duties. RCW 35.27.120. CP 521-522. Ruston's oath obligates the official to support the constitution and the laws

and "truly, faithfully diligently and impartially perform the duties of the office of Councilmember in the town of Ruston..." Councilmembers have limited power to pas ordinance not in conflict with the law and that are expedient to good government and the welfare of the town and its trade and commerce. RCW 35.27.370. Ruston's officials failed to fulfill their duties of good faith and fair dealing with Mr. Fabre. Ruston failed to undertake or exercise its limited authority in a non-negligent manner. In addition to being duty bound to undertake its limited authority non-negligently, Ruston owed Mr. Fabre a duty not to use its limited powers to regulate his cardroom out of business at the local level.

13. Negligent Misrepresentation of Ruston's Tax Rate and Ban

A well recognized duty in negligence case law is the duty that arises from negligent misrepresentation. The courts have specifically adopted the elements of negligent misrepresentation set forth in the Restatement (Second) of Torts § 552:

> One who, in the course of his business, profession or employment ... supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 210, 48 .3d 997 (2002). Public officials who make material misrepresentations of fact are

liable for their negligence. *Rogers v. Toppenish*, 23 Wn. App. 554, 596 P.2d 1096, review denied, 92 Wn. 2d 1030 (1979)(Zoning administrator told property buyer land was zoned for an apartment house when it was not.)

Here, Ruston represented to Mr. Fabre his tax rate was a flat tax rate of 12% from the date Mayor Everding sent his letter demanding the higher rate. CP 319, 321. Mr. Fabre objected and pointed out the problems with the tax rate, and Ruston insisted its tax rate was 12%, and it refused to enjoin enforcement of that rate until repealing it. CP 244, 246-247, 249. Further, Ruston insisted it passed a lawful ban on Mr. Fabre's business until it repealed its ban. CP 251, 253, 255. Mr. Fabre challenged both of these representations and received formal affirmation by way of an answer to each of his declaratory actions that denied his claims. Mr. Fabre had a right to rely upon Ruston's formal answers and representations that the rate was 12% and the ban effective. Thus, he closed down his cardgames and did not consider offering the games again until after Ruston formally repealed the rate and the ban. Mr. Fabre was harmed by defendant's false representations as to its tax rate and ban on his cardroom.

14. Ruston's Tortious Interference With Steve Fabre's Business

The trial court dismissed Mr. Fabre's tortious interference case with

an explanation that Ruston cannot tortiously interfere with his business when Ruston had the right to ban social card games in Ruston. The trial court's decision is erroneous for two reasons.

First, the trial court incorrectly applied the rules of statutory construction to conclude that Ruston, a town, had authority to ban card games. As set forth previously, the trial court read into RCW 9.46.295(1) the term "town" when the Legislature clearly limited the authority to prohibit gambling activities to cities and counties.

Second, the trial court erroneously concluded that Ruston cannot tortitiously interfere when Ruston "had the right to ban social card games in Ruston." The trial court mistakenly thought abuse of an existing power is not actionable. Abuse of power is precisely the basis for a tortious interference claim: "Municipal liability for the flagrant abuse of power by officials who intentionally interfere with the development rights of property owners cannot be avoided simply by labeling such actions "political"." *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989)(Tortious interference claim against City warranted for City's delay in issuing building permit). In *Pleas*, the court cites to many tortious interference cases against a municipality for denying permits, a power municipalities have, but may not abuse.

Mr. Fabre offered evidence that Ruston sought to increase his taxes

in retaliation for him asserting his rights in his public records case against Ruston and his defamation case against the Ruston Connection. He offered evidence of express animus towards him. He offered evidence of the close nexus in time between the tax hike and settlement in the suit. He offered evidence of the relationship between Ruston's officials and the Ruston Connection. He showed the close proximal relationship between him prevailing on the tax hike and Ruston initiating a ban. He offered more evidence that Ruston sought out the tax hike and ban for political reasons and for retaliatory reasons than was before the court in the *Pleas* case where the reviewing court upheld the validity of the tortitious interference claim. Similarly so to other cases of tortious interference upheld against a municipality. *Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007). The common characteristic in tortious interference cases against municipalities is the apparent targeting of a particular business. Here, Ruston targeted Mr. Fabre's business and shut him down for improper reasons and using improper means.

An important factor in this matter is that Ruston officials did not pass a ban on Mr. Fabre's cardroom. Ruston asked the people to ban his cardroom through a referendum power it did not have. So, in addition to incorrectly stating Ruston had the power to ban his cardroom, the trial

court incorrectly concluded Ruston could ban his cardroom using a prolonged Referendum process that tarnished his public reputation. Ruston had no referendum power to pursue a ban over several months. Ruston deliberately and intentionally used improper means to interfere with his business.

D. Trial Court's Failure to Hear Motion In Limine Prejudiced Mr. Fabre

In support of his response to Ruston's Motion for Summary Judgment, he moved in limine to suppress Ruston's evidence that Mr. Fabre failed to offer evidence of express animus towards him or his business. Mr. Fabre offered evidence of animus, but he did not offer any e-mail clearly expressing it because Ruston never produced e-mails in discovery. CP 367, 496. Ruston having failed to produce discovery could not then assert as a fact the absence of evidence. Mr. Fabre moved in limine to preclude this evidence, or assertion that there was no such evidence. The trial court refused to hear the motion in limine. This was error and prejudicial because Ruston was permitted to argue that it had no improper motive when Ruston had never produced any of the e-mails or other documents in response to discovery. Mr. Fabre was entitled to consideration of his motion prior to dismissal of his claims.

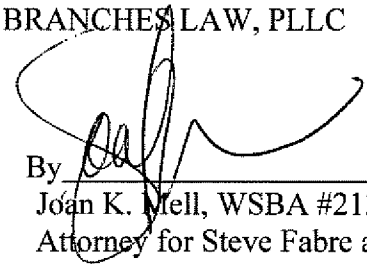
IV. CONCLUSION

Steve Fabre respectfully requests the court reverse the trial court's orders on summary judgment. The trial court erroneously found facts in Ruston's favor and incorrectly assumed a counter motion for summary judgment is an admission of undisputed facts. Mr. Fabre disputed many facts Ruston relied upon to include its contention that it never enforced its illegal tax or ban.

Ruston is not immune as a sovereign. Ruston has a duty to act non-negligently when exercising its limited local powers over gambling. Ruston has a duty to not misrepresent its tax rate. Ruston also has a duty not to represent it has referendum powers and ask its citizens to ban a business it does not like when it has no such power. Mr. Fabre has been left without a remedy to recover the losses he has suffered from Ruston's misconduct. Mr. Fabre should have the opportunity to present his case to a jury.

DATED this 7th day of September, 2012.

III BRANCHES LAW, PLLC



By _____
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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Mr. Fabre's Appeal Brief on all parties or their counsel of recorded by electronic mail on the date below as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the above information is true and correct.

Dated this 7th Day of September 2012 at Fircrest, Washington.

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January 21, 2013 - 12:22 PM

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